PP

v.

ALFRED VINCENT

HIGH COURT MALAYA, KUALA LUMPUR
ABDULL HAMID EMBONG J
[CRIMINAL APPEAL NO: 41-79-2003]
3 JUNE 2004

CRIMINAL PROCEDURE: *Sentence - Principles of sentencing - Public interest - Plea of guilty - First-time offender - Exercise of judicial discretion - Interference by appellate court - Whether sentence manifestly inadequate - Whether magistrate had erred in law or in fact*

This was an appeal by the public prosecutor against the decision of the learned magistrate sentencing the respondent, who was convicted of an offence under s. 379 of the Penal Code read together with s. 34 of the same Code, to a fine of RM2,500 or two months imprisonment in default. The main issue requiring determination in this appeal was whether the learned magistrate had correctly exercised the established principles and guidelines of sentencing in reaching her decision.

Held (dismissing the appeal):

[1] The learned magistrate had not erred in not considering the rampancy of the offence as the record of appeal showed that the prosecution had not tendered any such evidence regarding this factor. She had correctly applied the first and foremost principle of sentencing *ie*, the consideration of public interest; however, she had failed to consider that the respondent had pleaded guilty to the charge at the first opportunity, thus saving judicial time and costs. This factor, however, would be favourable to the respondent. She had also considered that the respondent was a first-time offender and, as such, it would not be appropriate to condemn him to a custodial sentence. The learned magistrate had clearly not erred in imposing a non-custodial sentence since it was a proper exercise of her judicial discretion. This court, in exercising its appellate jurisdiction, would not readily interfere with a sentence judicially considered and imposed by a lower court unless the sentence was manifestly and grossly inadequate or illegal, which was not the case in the present appeal. (pp 517 c-d, 518 c-h & 519 a)

[1a] If the prosecution had been so minded to see a heavier sentence imposed for offences of this nature, it should have shown its seriousness before the sentencing court by pressing for a deterrent sentence. A prosecuting officer is also at liberty to ask for a custodial sentence in an appropriate case. If that had been done in the court below, this court would be in a better position to assess whether the learned magistrate had erred in not properly evaluating the gravity and notoriety of the offence *vis-à-vis* the sentence she had found fit to impose. (p 520 a-d)

Case(s) referred to:
Hari Ram Seghal v. PP [1981] 1 MLJ 165 ***(foll)***
Leong Ka Kong v. PP [1976] 2 MLJ 21 ***(foll)***
PP v. Chew Chee Wah [1996] 1 CLJ 94 HC ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
PP v. Mohamed Nor & Ors [1985] 2 MLJ 200 ***(foll)***
R v. Kenneth John Ball 35 Car 164 ***(foll)***
Sau Soo Kim v. PP [1975] 2 MLJ 134 ***(refd)***
Soosainathan v. PP [2001] 2 MLJ 381 ***(refd)***
Yusmarin Samsudin v. PP [1999] 4 CLJ 391 CA ***(refd)***

Legislation referred to:
Penal Code, s. 379

For the appellant - Md Azar Irwan Mohd Ariffin DPP
For the respondent - En Dhaliwal; M/s Dhaliwal & Naicker

Reported by Suresh Nathan

JUDGMENT

Abdull Hamid Embong J:
The respondent in the Magistrate Court had pleaded guilty to and was convicted and sentenced on the following charge:

> Bahawa kamu pada 25.2.2003 jam lebih kurang 2000 hours bersama yang masih bebas di tempat letak kereta Pasaraya Carrefour Wangsa Maju, di dalam Daerah Sentul, Wilayah Persekutuan Kuala Lumpur, telah meragut sebuah beg tangan jenis Carolina warna hitam bernilai RM90.00 milik Rina Sabarina binti Safarin, KP: 761221-14-5526. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 379 Kanun Keseksaan dan dibaca bersama seksyen 34 Kanun yang sama.

Upon conviction the respondent was fined a sum of RM2,500 or in default two months imprisonment. The learned public prosecutor's appeal against sentence to this court was dismissed. Hence this further appeal.

The respondent was arrested when he attempted to snatch the handbag of the complainant at the Carrefour Wangsa Maju car park, when during a struggle, he fell to the ground and was apprehended by the complainant's husband. He pleaded guilty to the charge and in mitigation stated that he has a job, is married with two young children and that his wife was not working. The record also shows that he was a first offender. The prosecuting officer did not ask the court for a deterrent or custodial sentence but had prayed that an appropriate sentence be imposed.

Before this court, the learned deputy public prosecutor read out his written submission and submitted that a serious offence had been committed as reflected by the seven year maximum imprisonment sentence allowed under s. 379 of the Penal Code. He also submitted that the learned Magistrate had erred in fact in not taking into consideration the rampancy of the offence. However from the record of appeal, there was no such evidence tendered by the prosecution on whether this type of offence was rampant or not and as such I found that the learned Magistrate had not erred in not considering this factor. An attempt by the learned deputy was made before this court to produce some statistics on offences of this nature, but was disallowed by this court because the court held the view that any such statistics should have been produced at the first instance, before the Magistrate who passed the sentence.

Furthermore, the authenticity of the statistics was also in question. It could not therefore be thrown at this court, at will, as proof of the rampancy of such offences. The learned deputy had also correctly stated one of the principles of sentencing by reading a passage from the case of *Yusmarin Samsudin v. PP* [1999] 4 CLJ 391 which states:

> The principles of sentencing have long been entrenched and well settled in our criminal law jurisprudence and a court seised with such a jurisdiction is empowered to take into account the following considerations:
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> (1) the extent and seriousness of the offence committed;
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> (2) the guilty person's antecedents; and
>
> (3) the public interest factor.

The learned deputy also submitted that the learned magistrate had been wrong in law and fact in paying too much attention to the respondent's personal interest rather than looking at the interest of the public at large and quoted what Hashim Yeop Sani J said in *PP v. Loo Choon Fatt* [1976] 2 MLJ 256:

> The mitigation submitted by a convicted person will also normally bring up problems of family hardship and other usual problems of living. In such a situation the courts might perhaps find it difficult to decide as to what sentence should be imposed so that the convicted person may not be further burdened with additional hardship. This is in my view a wrong approach. The correct approach is to strike a balance, as far as possible between the interests of the public and the interests of the accused.

This court had perused the record of appeal and in particular the grounds of judgment of the learned Magistrate and had found that she had not been wrong in either law or facts in imposing the sentence on the respondent.

In my view the learned Magistrate had correctly applied the first and foremost principle of sentencing ie, the consideration of public interest and had correctly applied this principle as laid down in *R v. Kenneth John Ball* 35 Car 164. The learned Magistrate had not however considered that the respondent had pleaded guilty to the charge at the first opportunity, thus saving judicial time and costs. (See *Sau Soo Kim v. PP* [1975] 2 MLJ 134). This factor would however be favourable to the respondent.

She had also considered that the respondent was a first offender and as such it would not be appropriate to condemn him to a custodial sentence. (See *PP v. Chew Chee Wah* [1996] 1 CLJ 94 and *Soosainathan v. PP* [2001] 2 MLJ 381). On this issue, this passage from the learned Magistrate's judgment satisfied this court that she had foremost in her mind the public interest consideration in determining the appropriate sentence and I quote:

> Mahkamah merupakan penjaga kepada kepentingan awam. Sebelum mahkamah menjatuhkan sesuatu hukuman, kepentingan awam harus diberi keutamaan. Di sini mahkamah berpendapat beliau bukan merupakan 'habitual offender'. Maka satu peluang patut diberikan kepada OKT untuk kembali kepada jalan yang benar.

From the above it is clear that the learned Magistrate had considered not only justice to the accused but also to society.

This court had dismissed the learned public prosecutor's appeal without calling upon the respondent's counsel to address the court. To my mind the learned Magistrate had clearly not erred in imposing a non-custodial sentence and opted instead on a fine. This, in my view, is a proper exercise of her judicial discretion. It is trite law that this court will not interfere with a sentence judicially considered and imposed by a lower court even if this court is of a different view as regards the sentence imposed, so long as the sentencing court had not been wrong in law or principle in passing that sentence. This court in exercising its appellate jurisdiction will also not readily interfere with that

exercise of a judicial discretion unless the sentence is manifestly and grossly inadequate or illegal, which it could not find here. In *PP v. Mohamed Nor & Ors* [1985] 2 MLJ 200, the then Supreme Court strongly expressed this view and I quote this passage from the judgment of Abdul Hamid, then Chief Justice Malaya:

> The learned Judge has considered the antecedents, age, health and mental condition of the respondents and exercised his discretion under section 294 of the Criminal Procedure Code to bind them over.
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> Without having to analyse minutely the grounds given by the learned Judge for binding over the respondents it is our view that although he stated the principle in the assessment of appropriate sentence correctly, he did not seem to fully appreciate the fact that acts or activities of the nature committed by the respondents were likely to have far-reaching effect and indeed would not only prejudice the maintenance of public order but also affect the security of the whole nation. We cannot therefore agree with the learned Judge that this is a mere technical offence. The learned Judge also observed that the offences committed by the respondents did not involve violence. In our view an act or activities need not involve violence to produce very serious consequences especially where such act or activities are likely to lead to lawlessness and public disorder.
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> The question now remains whether we should disturb the sentence in the instant case.
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> In this regard we would observe that it is the established principle that an appellate court should be slow to interfere or disturb with a sentence passed by the court below unless it is manifestly wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances. And the mere fact that another court might pass a different sentence provides no reason for the appellate court to interfere if the court below applies the correct principles in the assessment of the sentence.
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> For reasons we have stated above it is our view that although a more severe sentence would have been appropriate, we do not feel disposed to interfere with the sentence imposed by the learned Judge in this particular case.

And in *Leong Ka Kong v. PP* [1976] 2 MLJ 21, the same learned judge in dismissing an appeal against sentence also held the following:

> It is settled law that sentences should not be interfered with by the appellate court merely because the individual presiding in the higher court might, having personal views on the matter, have passed a different sentence. The court should not therefore interfere with the lower court's discretion unless there is apparent on the face of the record a manifest error in law, or, in considering the facts and circumstances of the case.

It is also my view that if the prosecution had been so minded to see that a heavier sentence be imposed for offences of this nature, then before the sentencing court, it should have shown its seriousness by pressing for a deterrent sentence, which did not happen in this instance. It is the duty of the prosecuting officer at the first instance, to bring to the attention of the sentencing court and impress upon it the seriousness of a particular offence, its rampancy and the need to impose a heavy deterrent sentence as a means of checking it. A prosecuting officer is also at liberty to ask for custodial sentence in an appropriate case. In fact, in my view, where the facts of the offence so warrant and where such an offence has reached a level of notorious prevalence, the prosecuting officer, in the public interest, is duty bound to press for such a custodial sentence. The court in exercising its sentencing discretion must however be always guided by established principles and guidelines, and, in the words of Wan Yahya J in *Hari Ram Seghal v. PP* [1981] 1 MLJ 165 "must resist the temptation and decline any invitation into playing the romantic role of the avenger, and must concentrate itself instead on procuring justice and upholding the rule of law ..." If that had been done in the court below, then this court would be in a better position to assess whether the learned Magistrate had erred in not properly evaluating the gravity and notoriety of the offence *vis-a-vis* the sentence she had found fit to impose.

For the above reasons, this appeal was dismissed.